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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1256

JESSE PUGH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

JESSE PUGH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Petitioner, Jesse Pugh, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on the 6th day of January, 1972.

Opinion.

The Court of Appeals of the State of New York rendered no opinion, stating simply that it affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department without opinion. The opinion of the Appellate Division, Second Department, and the dissenting opinion in that court are reported at 36 A. D. 2d 845, 321 N. Y. S. 2d 845. The opinion and dissenting opinion are appended hereto as an exhibit. The opinion of the Supreme Court, Westchester County, per Mr. Justice John H. Galloway, Jr., finding the defendant guilty after

trial without a jury was not reported. The opinion of the Supreme Court is appended hereto as an exhibit.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York was entered on the 6th day of January, 1972. The jurisdiction of this court is invoked under Title 28 United States Code §1257 (3).

Questions Presented.

The questions presented in this case are as follows:

1. Whether an indictment in a state criminal prosecution violates the Fifth and Sixth Amendments of the United States Constitution, as the same are incorporated into the Fourteenth Amendment of the United States Constitution, where the indictment fails separately to state the "nature and the cause of the accusation" against the defendant, and where it pleads only the language of the statute claimed to have been violated, where there is no statement of any kind as to the nature of the acts alleged to violate the said statute, and no allegation of the manner, means and effect of the alleged violation.

2. Whether an indictment in a state criminal prosecution violates the requirements of due process of law, as the same are prescribed in the Fourteenth Amendment of the United States Constitution, where the indictment fails to conform to the clear and unequivocal commands of the constitution and statutes of the state wherein the said criminal prosecution is had, the said failure to conform being comprised of the same defects described in question No. 1 hereof.

Constitutional Provisions and Statutes Involved.

Amendment V of the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article 1, §6, New York State Constitution.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces, in time of war, or which this state may keep with consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall

be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

The instant case was tried and the instant indictment was drawn pursuant to the provisions of the old Code of Criminal Procedure and not under the new Criminal Procedure Law which was effective September 1, 1971. Therefore the relevant sections are cited from the old Code of Criminal Procedure.

Section 275 of the Code of Criminal Procedure provides as follows:

§275. Indictment, what to contain

The indictment must contain:

1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

2. A plain and concise statement of the act constituting the crime, without unnecessary repetition.

Section 4 of the Code of Criminal Procedure provides as follows:

§4. Crimes, how prosecuted

A crime must be prosecuted by indictment, except.

1. Where proceedings are had for the removal of a civil officer of the state on impeachment by the assembly for willful or corrupt misconduct in office;

2. Where proceedings are had for the removal of justices of the peace, police justices and justices of justices' courts and their clerks;

3. A crime arising in the militia when in actual service, and in the land and naval forces in time of war, or which this state may keep with the consent of congress in time of peace;

4. Such crimes as are hereinafter or in special statutes specified as cognizable by courts of special sessions, police courts and city courts.

Section 974-a of the old Penal Law provides as follows:

> Any person who knowingly keeps, occupies or uses a place, building, room or establishment for the purpose of receiving money or written records, used over any period of time in playing what is commonly called "policy" or "the numbers game", from a person other than the bettor or player whose bets or plays are represented by all such money or written records, or for the purpose of receiving in any one day more than five hundred dollars of money used in playing what is commonly called "policy" or "the numbers game" or written records of more than one hundred plays or bets made over any period of time in what is commonly called "policy" or "the numbers game", and any person who knowingly receives money or written records used in playing what is commonly called "policy" or "the numbers game" from a person other than the bettor or player whose bets or plays are represented by all such money or written records, or who knowingly receives in any one day more than five hundred dollars of money used in playing what is commonly called "policy" or "the numbers game" or written records of more than one hundred plays or bets made over any period of time in what is commonly called "policy" or "the numbers game", shall be guilty of a felony punishable by imprisonment for a term not exceeding five years.

Section 276 of the Code of Criminal Procedure provides as follows:

> §276. Form of indictment
>
> The indictment shall be signed by the district attorney, and may be substantially in the following form:
>
> Supreme court, county of ..... (stating the proper county).

or

Supreme court, city and county of New York.

or

County Court of the county of ..... (stating the proper county).

or

Court of general sessions of the city and county of New York.

The People of the State of New York
against
A.B.

The grand jury of the ..... (here insert the name of the county, or of the city, or of the city and county, in which the indictment is found), by this indictment, accuse A.B. of the crime of ..... (here insert the name of the crime), if it have one, such as treason, murder, arson, manslaughter, or the like, or if it be a misdemeanor, having no general name, such as libel, assault or the like, insert a brief description of it, as it is given by statute), committed as follows: The said A.B., on the ..... day of ..... 18....., at the town (or city or village, as the case may be) of ..... in this county (here set forth the act charged as an offense).

A.B.,
District Attorney of the County of
.....

Statement of the Case.

The indictment.

The indictment is appended hereto as an exhibit. The first count is for operating a policy business in violation of §974-a of the old Penal Law of the State of New York. The second count framed under the same section of the same law is for feloniously maintaining a place for playing the game of policy. The third count charges possession of policy in violation of §975 of the old Penal Law. The fourth count charges the defendant with possession of obscene film as a misdemeanor. The case was tried by the court without a jury and the defendant found not guilty of the third and fourth counts each of which charges a misdemeanor, but guilty of the first and second counts, each of which charges the commission of a felony. The defendant was sentenced to serve one year on each of the first two counts in the Westchester County Penitentiary to be served concurrently.

The record.

The record in this case before the Court of Appeals of the State of New York consisted of a printed record of the indictment, the record of trial, judgment of conviction plus the additional papers before the Court of Appeals recording the action of the Appellate Division of the Supreme Court. Numerical references below will be references to the page numbers in the said record.

Statement of the case.

The petitioner bases his petition upon the face of the first two counts of the indictment under which he has been found guilty. The indictment is annexed hereto as an exhibit and appears at pages 5, 6 and 7 of the record

before the Court of Appeals of New York State. The petitioner's specific complaint is that, aside from mentioning the city, county and state and the date, there is no information in either of the first two counts of the indictment which is not couched in the exact language of §974-a of the Penal Law. There is not one word of information designed to advise the petitioner as to the nature of the acts performed by him, which are alleged to have constituted the conduct which violated §974-a of the Penal Law. The petitioner would have been afforded as much information as he was given by this indictment by the simple citation of the section number of the Penal Law alleged to have been violated. It is the burden of the argument below that this sort of allegation in an indictment is insufficient to satisfy the substantive purpose of the indictment, to wit: insufficient to enable the defendant to prepare his defense, and insufficient to protect a defendant against future jeopardy for the same offense.

There is no contest about the fact that this indictment was drawn pursuant to the provisions of §§275 and 276 of the Code of Criminal Procedure which have been cited above. These are so-called long-form indictments under those sections, and both sides so agree. Simplified or so-called short-form indictments are permitted under §§295-b, 295-c, and 295-d of the Code of Criminal Procedure of the State of New York. Those sections are not cited herein since they are not in issue. No one in the case claims that the present indictment was a simplified or short-form indictment drawn pursuant to the provisions of the 295 series of sections of the Code of Criminal Procedure. There might be a very strong argument presented, if it were here relevant, to the effect that the entire simplified or short-form scheme of indictments as embodied in 295-b, c and d of the Code of Criminal Procedure is an unconstitutional scheme. That

argument is not here advanced only because the prosecution, that is to say, the respondent here, agrees that the present indictment is a conventional long-form indictment and must stand or fall as a long-form indictment.

The petitioner first raised questions here advanced by motions made at his trial in County Court. At the close of the People's case, the defendant reserved all motions to be made at the close of the People's case for the close of the trial, and the trial judge consented to this procedure, and made the statement that the defendant's motions at the close of the People's case were reserved for the close of the evidence (144). Then at the close of the evidence, the petitioner's counsel moved on his behalf to dismiss, and specifically made a motion to dismiss the indictment upon the very grounds now being urged (206). Then in the Appellate Division of the Supreme Court petitioner urged in his Point VIII of his appellant's brief that the indictment violates both the Federal and State Constitutions upon the grounds here being urged, and orally argued this point. In the Court of Appeals of New York State the petitioner urged in Point VII of his appellant's brief that this indictment violates both the Federal and State Constitutions, and argued this point at some length. A portion of the trial record in which petitioner's counsel moved to dismiss upon the insufficiency of the indictment on its face is as follows:

> "Now, from an overall standpoint, I would further move to dismiss this indictment on what I consider to be a fatal defect: Each and every one of these counts, if you read them, is nothing more than a recitation of the statute. That applies to every one of these counts.
>
> "In such a situation, I am of the opinion that the indictment is defective. Unfortunately, I fail to carry that law along with me, but, if your Honor wishes, I will get some citations to you—

in fact, I see where Judge Trainor dismissed one only the other day—which hold that, where the indictment gives no more information except to recite the statute, then it fails to apprise the defendant of what he is specifically charged with, fails to permit him to properly defend himself in the proceeding, and fails actually to give the Court jurisdiction over the defendant on the crimes charged.

"For those reasons, in addition to all the others I have given to you, I would move to dismiss the indictment."

This petition is based purely upon the inadequacy of the indictment. It is necessary, however, that the facts adduced at trial be discussed briefly so that the specific prejudice resulting from the defective indictment can be assessed.

This case was heard by the trial court without a jury, the jury having been waived by the defendant.

There are four counts in the indictment. The first count is for operating a policy business in violation of §974-a of the Penal Law (the old Penal Law). The gravamen of this count is the receiving of written records of more than 100 plays. The second count framed under the same section is for feloniously maintaining a place for playing the game of policy. The gravamen of this count is the charge that the defendant did knowingly keep, occupy or use certain premises for the purpose of receiving written records of more than 100 plays. Thus the first two counts deal *both* with receiving written records of plays. The third count charges possession of policy in violation of §975 of the Penal Law. The fourth count charges the defendant with possession of obscene film as a misdemeanor. The first two counts purport to charge felonies and the second two counts to charge misdemeanors.

The first three counts all deal with a single transaction which occurred on February 14, 1967. The fourth count deals with possession on the subsequent day, February 15, 1967, when the police returned to arrest the defendant because of what they had allegedly observed on February 14, 1967. The trial court found the defendant not guilty of the third and fourth counts, but guilty of the first and second counts.

The third count for possession of policy slips has been dismissed and as a litigable issue is dead. Its shadow, however, is cast upon the first and second counts. The possession referred to in the third count is intended to be possession of the very same slips at the very same moment as to which the defendant is accused of feloniously receiving in the first two counts. There is no other evidence in the record tending in any way to sustain the first two counts except the evidence which was offered by the People to show possession of the policy papers. Therefore the acquittal of the defendant (which was clearly mandated by the record) of having had possession of the policy slips on February 14, 1967, at a stated time and place prohibits a finding of guilty of receiving the same policy slips at the same time and place and of maintaining a place for receiving the same records at the same time and place.

The testimony briefly was as follows: Detective Jesse Taylor testified on behalf of the People both at the suppression hearing held on April 17, 1967, and at the trial on May 5, 1969. He said that on February 14, 1967, he and Det. Verne had the J and B Record Shop under surveillance from 11:30 a.m. until approximately 1:15 p.m. (27, 28, 47, 48). The witness and Det. Verne were seated in an unmarked vehicle which was approximately 100 feet away from the store of the record shop (27, 47, 76). During the surveillance approximately 53 people

entered the store and left without carrying any type of package (48). At 12:45 p.m. the policemen saw the defendant approach the store walking in an easterly direction on Babcock Place so they drove their unmarked vehicle north on Warburton Avenue at a high rate of speed with their siren sounding (48). They saw the defendant look around the corner in the direction of their police vehicle and saw him start back to his place of business. Ten minutes afterwards the policemen came back and the witness went to the rear of the store while Det. Verne went toward the front (49). Before the police alighted from the vehicle the witness observed a person known to him as William Washington who banged on the show window in the front of the store and shouted "Cops" (50). As the witness was going through the alleyway toward the rear of the premises he observed pieces of paper falling to the ground (12, 51). The slips came from the very top of a grated window, there being a six-inch opening above the top edge of the grate. The witness saw a hand which dropped the papers, but did not see the person who threw the slips out the window (12, 28, 54). The witness collected the papers and went to the front of the building. He examined the papers, which contained, according to his testimony, 4,279 policy plays (55, 58). The witness did not know what Det. Verne was doing while he was in the alleyway and in the back of the store. When the witness returned to the front of the store Verne was either at the car or walking toward the car (83, 90). From the time when the witness left the car until he came back with the slips was approximately 5 to 10 minutes (90). The witness did not know whether Verne entered the premises at all and did not know what Verne was doing while the witness was in the alleyway (83, 91). The witness went to the car and discussed the case with Verne and decided against arresting anyone at this time. They decided instead to talk to Capt. Vescio, their superior (94). After they

got their instructions they procured an arrest warrant directed against John Jessup, William Washington and the defendant Pugh. They returned the following day, February 15, and arrested the defendant and William Washington, but found no horse bets or policy or baseball or sporting slips of any kind or gambling material of any kind and nothing to indicate that any money present was contraband (38-40, 60). While the officers were in the store on the 15th the telephone rang and the witness picked up the telephone and testified "I received policy plays over the phone from an unknown person" (61). The witness stated that February 14, 1967, was not the first day that the officers were in the neighborhood for surveillance purposes (71). They had been there several times and had spoken to the defendant plenty of times, and the defendant was very much aware of the fact that both the witness and Verne were police officers (72). The witness took notes that day, but threw them away (75). The witness does not carry a notebook, but makes notes on whatever scrap of paper he has in his possession (76). He had no knowledge of what the 53 people he talked about, who went into the shop, were doing there. The witness saw the defendant do nothing which was illegal (79, 80). At the time of the arrest on the 15th they searched the place and found nothing illegal, but took certain money. There was nothing illegal about the money and found no horse bets or sports bets of any kind in the premises (38-40, 99-101).

Henry Richardo Verne also testified for the People and also was a police officer of the City of Yonkers. He said that he and Det. Taylor placed the B and J Record Shop under surveillance from 11:30 a.m. to 1:00 p.m. on February 14, but he placed their vantage point at 375 feet away instead of 100 feet away (103, 104). He saw William Washington looking up and down the street and walking back and forth in front of the shop (105). The

policemen drove to the area of Babcock Place and approached the premises from the corner of Babcock Place toward Warburton Avenue. While en route they observed the defendant who was looking at the policemen at the time. When the defendant observed the policemen he ran toward the record shop (105). The witness walked into the record shop premises and observed John Jessup standing behind the counter (106). A few seconds later the witness observed the defendant coming from the rear room of the premises and there was some conversation during which the witness asked the defendant his name and address and if he was the owner of the premises. It doesn't appear that the question as to the ownership of the premises was ever answered (107). The police made no arrest on February 14 and made no search (111). The witness made no notes on February 14 (116, 117). On an earlier occasion he had spoken to the defendant at the time of a routine check and asked his name and address and if he was the owner of the premises. It doesn't appear that at this time any answer was made to the question as to the ownership of the premises (117, 118). On the 14th when the witness saw the defendant outside the premises there was no question in the witness' mind that the defendant saw the witness. It was very obvious (118, 119). The end of the counter in the store proper was 3 feet from the door to the rear room. This was the counter where the witness saw Jessup (122, 123). The defendant emerged from the rear room 6, 7 or 8 seconds after the witness entered the premises (123). On re-direct examination the witness said that on certain prior occasions which were unidentified, when the witness asked the defendant, the defendant told him that he was the proprietor of the record shop (127).

John J. McKeon, an employee of the District Attorney of Westchester County, qualified and testified as an expert as to the nature of the papers which fluttered down from the window.

The defendant Jesse James Pugh testified on his own behalf at page 144 *et seq.* He said that on February 14 he was standing in the front of the store near the window but inside the store (145). He observed directly across the street, on the hill which is Cottage Garden, that the officers were parked for maybe 20 or 30 minutes at a time, then they would go around the block and come back. He had seen the same officers several times before on that day. (146). He saw them Monday, Tuesday and the week before that several times (147). February 14th he said was a Wednesday (146, 147). They had been parked at the same place and had been in the store (147). Each time they said it was just a routine check. The defendant knew they were police officers (148). On February 14th the defendant went outside and spoke to Jesse Taylor and asked him what was wrong and "is the heat on." Taylor answered "I'll be frank with you we were sent here. We are just doing our job." The defendant said "I respect that, what can I say you are doing your job." Taylor responded "Vescio sent up; get Jesse Pugh so we are out to get you, but be careful stay clean" (148, 149). On February 14th the police were there all morning (149). At that time William Washington and Jessup were both in the store (149). Taylor stayed in the car and Verne came into the store at maybe 11:30 or 12 o'clock (149, 150). When the police had been in the store earlier on the 14th, but when they came in the second or final time the defendant went out of the store to meet them (150, 151). Taylor got out of the car and Verne said "Go around and check the back" (151). Defendant said "I mean what's wrong I see you're back again." Verne said they were just checking. The defendant said "Check—you want to search the place" (151, 152). Verne and the defendant went in together and Verne opened the bathroom door (152). The defendant said there was nothing in the place unless the police put it in, and he said he would be a fool under the cir-

cumstances, watching them all day and so forth (153). The defendant and Verne went into the rear room together and came out together (153). The policemen then left (154). Later the defendant saw them taking pictures, and talked to Taylor, who said this was just routine. The defendant never asked Taylor, as Taylor had testified earlier, whether he Taylor had gotten the "action" (155, 171). The defendant said he never threw anything out the rear window (155). The defendant said that the window through which the slips are alleged to have come has a latch on top, but it was impossible to open it, although he admitted that the officers managed to pry it open and force the window, but he said it was impossible just to walk up and open the window like a normal window (158-160).

Coy O. Johnson testified for the defendant at 175 *et seq.* He said that he had never testified in court before and had never been convicted of a crime (175). He knows the defendant Pugh and buys cigarettes from him. He specifically mentioned Pugh's grocery and delicatessen store next door. The witness had worked for General Motors for 15½ years and had known the defendant Pugh for 4½ years. (175, 176). The witness drove into the Shell Gasoline Station on February 14th at 1:00 o'clock. This station was directly across the street from the B and J Record Shop (177). He saw a car come around the corner squealing its brakes. One of the two occupants got out of the car and was talking to the defendant Pugh out on the sidewalk and the other occupant went around the old drug store on Babcock Place (178, 179, 186, 187).

Reasons for granting the writ.

Various requirements of the Fifth and Sixth Amendments have been held to bind the several states through their incorporation into the due process requirements of the Fourteenth Amendment.

United States ex rel. Griffin v. Martin, 409 F. 2d 1300;
Erwing v. Sigler, 413 F. 2d 593, cert. den. 397 U. S. 947, 90 S. Ct. 968, 25 L. Ed. 2d 129;
Booker v. Phillips, 418 F. 2d 424;
Fugate v. Gaffney, 313 F. Supp. 128;
Goodwin v. Page, 296 F. Supp. 1205;
Bowles v. Willingam, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892;
Duncan v. Louisiana, 391 U. S. 145, 20 L. Ed. 2d 88 S. Ct. 1444;
Smith v. Illinois, 390 U. S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956;
Smith v. Hooey, 393 U. S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607;
Harrington v. California, 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726;
United States ex rel. Maldonado v. Denno, 239 F. Supp. 851;
Benton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707.

The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation against him." It is submitted that "nature" and "cause" are not synonymous, and refer to two separate requirements which cannot both be satisfied by the verbatim quotation of the criminal statute involved.

The lower federal courts have held that the above requirements of the Fifth and Sixth Amendments bind the states by reason of their incorporation into the Fourteenth Amendment.

McSurely v. Ratliff, 282 F. Supp. 848, app. dismissed 39 U. S. 412, 88 S. Ct. 1112, 19 L. Ed. 2d 1272;
Doss v. North Carolina, 252 F. Supp. 28.

In *McSurely*, the court held "Under the Sixth Amendment a person cannot be charged merely with violating the law; the charge must be more specific." In the instant case the petitioner was charged "merely with violating the law." No facts are alleged.

This court has recently dealt in very great detail with the requirements of indictments in *Russell v. United States*, 369 U. S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240. The indictment there was a federal and not a state indictment, but the reasoning seems clearly to be directed at the requirements of due process generally. The principles which the petitioner has already urged in the various state courts, and urges here, are stated with the greatest eloquence in this part of the holding:

> "It is an elementary principle of criminal pleading, that there the definition of an offense, whether it be by common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as the definition; but it must descend to the particulars. * * *
>
> "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description with which he is charged."

In the instant case the indictment (and most importantly the two felony counts of which petitioner was found guilty) contains only the language of the statute and the date and the name of the city where the violation is alleged to have occurred.

In *Cole v. Arkansas,* 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644, there is at least strong dictum to the effect that the requirements above discussed relate alike to federal and state trials. There is also an indication in *Cole* that where state law prescribes a procedure for criminal trials and appeals, compliance with that procedure is a part of federal due process. The court held, "Furthermore, since Arkansas provides for an appeal to the State Supreme Court, and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioner's convictions must stand or fall."

It is submitted, as a general proposition, that where the state constitution and statutes prescribe a mandatory procedure, failure to follow that procedure is a failure to accord due process, and therefore, violates directly the provisions of the Fourteenth Amendment.

In this case and in the matter of this indictment the State of New York has failed to follow the mandates of its own constitution and its own statutes. A brief discussion of the law of New York follows.

An indictment is required separately to state the crime and the acts constituting the crime and the omission of either is fatal and renders the indictment or information defective and insufficient in law. The omission is either of these elements deprives the defendant

of two basic rights (a) the right to be informed of the charge which he must face at trial and (b) the right to be protected against again being tried for the same offense after he shall have been either convicted or acquitted of the offense on trial.

People v. Corbalis, 178 N. Y. 516;
People v. Zambounis, 251 N. Y. 94;
People v. Schultz, 301 N. Y. 495;
People v. Grogan, 260 N. Y. 138;
People v. McGuire, 5 N. Y. 2d 523, 186 N. Y. S. 2d 250;
People v. Bogdanoff, 254 N. Y. 16;
People v. Ercole, 308 N. Y. 425;
People v. Richardson, 64 Misc. 684, 120 N. Y. Supp. 712, and authorities there cited.

"The requirement that an indictment and information must state the crime with which a defendant is charged, and the particular acts constituting that crime is more than a technicality; it is a fundamental and a basic principle of justice and fair dealing, as well as a rule of law."

People v. Zambounis, 251 N. Y. 94;
People v. Schultz, 301 N. Y. 495.

When the Court of Appeals has said that this is a basic rule of justice and fair play, it has said that this is a necessary requisite of a fair trial and a part of due process. Therefore, compliance with this rule of law is mandated by the due process clauses of both the federal and state Constitutions. But additionally both Constitutions have specific provisions requiring such a separate statement of the crime and the specific acts constituting the same. The Sixth Amendment of the United States Constitution provides that a defendant has a right "to be informed of the nature and cause

of the accusation." The words used by the framers of both Constitutions admit of no doubt as to their meaning, the nature of the accusation would be the nature of the crime, of the statute violated. The cause of the accusation plainly refers to the acts which form the foundation of the alleged violation.

Accordingly it has been specifically held that it is a *constitutional* requirement that the crime and the acts constituting the crime must be separately stated.

People v. Bogdanoff, supra;
People v. Ercole, supra.

Bogdanoff reaffirmed this requirement, and sustained the short form indictment as constitutional only because the mandatory bill of particulars (Code of Criminal Procedure, §295 *g et seq.*), becomes part of the record and supplies the constitutionally required elements which are missing from the prescribed short form or simplified indictment. The indictment in *Bogdanoff* was more complete than the indictments in the case at bar. The Court of Appeals held, however, that as a long form indictment it would be constitutionally deficient.

These requirements have been carefully implemented by the Legislature. Section 275 of the Code of Criminal Procedure provides in part that the indictment shall contain "a plain and concise statement of the act constituting the crime." Section 276 which mandates the form of an indictment shows a first paragraph which sets out the crime and the section of the law violated, and a second paragraph which is required by the statute to "set forth the act charged as an offense."

The cases cited above hold and explain that this requirement as to this basic principle of justice applies with equal force to indictments and information.

An examination of the first two counts of the indictment in the case at bar disclose that they fall precisely within the prohibitions in the cited cases and in the Constitutions and in the statutes. In fact they are a textbook case of that which is condemned. In *People v. Corbalis*, 178 N. Y. 516, in dismissing an indictment for gambling the Court of Appeals said the following:

> "The draftsman of the indictment before us evidently appreciated the force and effect of these decisions for the indictment in the first place charges the crime, and then makes a further statement apparently intended to comply with that provision of this Statute requiring that the indictment shall state the act constituting the crime. But not an act is stated in this part of the indictment which is not to be found in that portion of it which charges the crime. Indeed it conveys no additional information to defendants whatsoever."

In the instant case the indictment fails to perform in any respect the function of an indictment. It is submitted that it is so defective on its face, that general prejudice to this defendant must be presumed.

On the facts of this case, specific prejudice is easy to demonstrate. The chief evidence is that an unidentified hand was seen to throw papers from a window in the premises wherein the crime is alleged to have been committed. The record supports the conclusion that there were two other persons inside the store whence the papers issued (Jessup and Washington). From this evidence there is sought to be erected proof of two complex felonies.

1. Proper preparation of defendant's case is made impossible by this indictment. Even now, petitioner is unenlightened on the pathway from simple possession, by some unidentified person, of certain slips, to earlier receipt of those slips by the petitioner, and also to the maintenance of a place by petitioner for the purpose of receiving those slips. At the very least there should be in the indictment factual allegations delineating this tortuous pathway.

2. This indictment fails to protect petitioner against future jeopardy. The circumstances are not described. The policy slips are not described as to the number of plays or otherwise. It is not even mentioned how many policy slips were involved. Under such an indictment as this, it is possible to retrieve a large number of slips *at one time*, arbitrarily to divide them into several groups, and to initiate separate successive prosecutions on each of the several groups. This would be multiple jeopardy, but under this indictment a defendant would be disabled from establishing the defense.

Very akin to this objection is the difficulty which petitioner did in fact encounter with respect to his contention that the trial court's decision was repugnant or at least inconsistent (see majority and minority opinions in the Appellate Division of the Supreme Court). It was necessary for the parties and the various courts to search the record and sort out the facts in order to come to some conclusion on this matter, a procedure which tends toward some vagueness. It is submitted that had the first three counts of the indictment been drawn with sufficient definiteness to satisfy the requirements of due process, it would have been simple, from an examination of the indictment itself, and the trial court's opinion, to establish whether or not the decision is repugnant and therefore defective.

Conclusion.

For all of the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals of the State of New York should be granted.

Dated: March 23, 1972.

Respectfully submitted,

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APPENDIX.

Opinion and Dissenting Opinion in the Appellate Division of the Supreme Court.

By Hopkins, Acting P. J.; Munder, Christ, Brennan and Benjamin, JJ.

People, &C., res, v. Jesse Pugh, ap—Appeal by defendant from a judgment of the Supreme Court, Westchester County, rendered Sept. 4, 1969, convicting him of operating a policy business in violation of section 974-a of the former Penal Law, a felony, and of feloniously maintaining a place for playing policy, after a nonjury trial, and imposing sentence.

Judgment affirmed.

Defendant was indicted under four counts: (1) receiving written records of more than 100 policy bets, a violation of section 974-a of the former Penal Law; (2) keeping and using premises for the purpose of receiving written records of more than 100 policy bets; (3) possession of records of policy bets, a violation of section 975 of the former Penal Law; and (4) possession of four reels of obscene moving picture film. After trial before the court without a jury, he was convicted of the first and second counts and acquitted of the third and fourth counts, the trial court finding that the prosecution had failed to prove defendant's guilt beyond a reasonable doubt.

Defendant has argued several grounds for reversal, but only one of them requires discussion. We think the evidence in the record was sufficient to establish his guilt beyond a reasonable doubt, as found by the trial court (*People v. Wachowicz*, 22 N. Y. 2d 369, 372). Defendant seeks reversal, however, on what he terms the repugnancy between the finding of guilt of the first

and second counts and the finding of innocence of the third count. The precise language in the trial court's opinion is stated in the dissenting memorandum and need not be repeated here.

Defendant apparently chooses the word "repugnant" in describing these findings rather than the word "inconsistent" because he is aware of the settled rule that each count in an indictment is considered separately and that inconsistency in the verdicts on the counts in an indictment does not invalidate the verdict (*People v. Torres*, 5 A. D. 2d 134, aff'd 5 N. Y. 2d 804, cert. den. 359 U. S. 993; *People ex rel. Troiani v. Fay*, 13 A. D. 2d 999, cert. den. 368 U. S. 1003). "Adopting the view that each count in the indictment is to be regarded as if it was a sepaarte indictment, consistency in the verdict is not necessary under *Dunn v. United States* (284 U. S. 390, 393, per Holmes J.)" (*People v. Sciascia*, 268 App. Div. 14, 15, aff'd 294 N. Y. 927).

The settled rule applies as well to determinations made by a judge sitting without a jury (*People v. Broome*, 21 A. D. 2d 899, revd. on other grounds 15 N. Y. 2d 985; *Matter of DeMott v. Notey*, 4 Misc. 2d 996, revd. on other grounds 3 N. Y. 2d 116; see cases collected in anno., 18 ALR 3d 259, 286-287).

Repugnancy in verdicts has considerably less application (*People v. Bullis*, 30 A. D. 2d 470). It posits that an indictment charges two crimes, each of which has identical elements; and if the jury's verdicts are guilty as to one crime and not guilty as to the second, they cannot mutually stand. This was the holding in *Bullis* where the jury found the defendant not guilty of sodomy in the first degree, but guilty of sexual abuse of an infant eight years of age, although by the provisions of the Penal Law each crime under the circumstances of the case contained identical elements.

But in the present appeal the counts in the indictment did not contain identical elements. The first two

counts charged different aspects of section 974-a of the former Penal Law making the operation of a policy business a crime, the first in that defendant had received policy bets and the second in that he had occupied and used premises for the purpose of receiving policy bets. The third count, on the other hand, charged him with possession of policy bets under section 975 of the former Penal Law. The ingredients of the crimes charged are not identical (*People v. Miller*, 34 Misc. 2d 611). Hence, the doctrine of repugnancy is not applicable.

Beyond this side of the case, we must note that even in the jurisdiction where it is said that consistency in findings made by a judge in criminal trials must be observed (cf. *United States v. Maybury*, 274 F. 2d 899), later expressions of the rule limit it to situations where no rational theory can support the difference in the findings (*United States v. Wilson*, 342 F. 2d 43; *United States v. Krol*, 374 F. 2d 776). Mere difficulty in making a satisfying explanation for the difference does not require the findings of guilty to be set aside (cf. *People v. Matarese*, 283 App. Div. 826, aff'd 307 N. Y. 752).

We think there was a rational basis for the difference in findings in the present case. The violations of section 974-a of the former Penal Law pertain to the operation of a policy business. The trial judge found that the police had seen 53 persons entering and leaving defendants record shop within an hour and a half, none of them carrying a package from the shop, and had seen someone on the same day flinging slips showing over 4,000 policy plays out a rear window of the shop. The trial judge also found that on a second day, when the arrest was made, the police, answering defendant's telephone, received policy bets from the caller in defendant's presence. The trial judge further found that defendant made a statement to the police which

indicated knowledge of the policy slips having been thrown from the window on the first occasion.

The evidence was sufficient to establish defendant's guilt on the first two counts. As to the third count, the trial judge puts his finding of not guilty in the form that the prosecution had not demonstrated defendant's guilt of possession beyond a reasonable doubt. The trial judge may well have concluded that defendant was not connected physically with the tossing of the policy slips out the window, having in mind the rule that possession must be proved conclusively (*People v. Wolosky*, 296 N. Y. 236, 238-239; cf. *People v. Wolosky*, 12 N. Y. 2d 848). His finding as to possession under the first two counts does not satisfy the requirements of the third count that it be actual or physical; and for the purposes of the first two counts a finding of constructive possession would suffice.

Last, we think that defendant might well have been held under the third count (*People v. Ulisano*, 18 A. D. 2d 432, 436), and that he should not be allowed to use his acquittal thereof to obtain a further advantage. We consequently affirm the conviction.

Hopkins, Acting P. J., Munder, Brennan and Benjamin, JJ., concur.

Christ, J., dissents and votes to reserve the judgment and grant a new trial, with the following memorandum:

Defendant was tried by the court without a jury on a four-count indictment charging him with wilfully receiving policy slips, maintaining a place for the playing of policy, possession of policy slips and possession of obscene film. The trial court found defendant guilty on the receiving and maintaining charges. In its written decision reciting the findings leading to the conviction of these two charges, the court said, "We find and determine that the credible evidence establishes beyond a reasonable doubt that on Feb. 14, 1967 the defendant

was in possession of and had custody and control of, and threw out the window of the rear room of his store numerous 'runners day slips' recording some 4,279 policy plays." Despite this unequivocal finding of actual physical possession of policy slips by defendant, the court acquitted him on the third count charging possession, stating, "We find and determine that the People have failed to prove beyond a reasonable doubt the charges under the third count of the indictment, and therefore find defendant not guilty under said count."

There can be no dispute that the finding of actual possession of policy slips in connection with the first and second counts is utterly inconsistent with the acquittal on the third count. While possession of policy slips is not an essential element to prove the charges of receiving and maintaining, I think it clear from the evidence in this case and from the trial court's written decision that the finding of actual possession was the keystone of the convictions on the first and second counts. In that context, the acquittal on the possession count is not only inconsistent with the convictions on the receiving and maintaining counts; it is repugnant to them and they cannot stand (cf. *People v. Bullis*, 30 A. D. 2d 470). If the evidence of possession is eliminated, I think the remaining evidence is insufficient to sustain the convictions. While inconsistency has been tolerated in jury verdicts because of special considerations relating to the nature and function of juries, we do not "enhance respect for law or for the courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal changes that, for historic reasons, has been granted the jury" (*United States v. Maybury*, 274 F. 2d 899, 903).

in the rear room, and $430.00 from defendant's person. Defendant asked the detective, who had collected the policy slips beneath the window on the previous day, whether he had got the "action" (meaning policy plays) that came out of the window. He told defendant he could not tell him, and when defendant asked if he could talk with the detective at the latter's home, the detective told him he did not know when he'd get home.

Defendant testified in his own behalf. He said that these detectives had, previous to February 14th and 15th, been in his store on what they called a "routine check"; that one of them also told him that the "Captain" was after him and advised him "just to keep clean". He denied throwing the "action" out the rear room window or asking the detective if he had found any "action".

Defendant admitted that he had been in the same premises for 10 years, and that he had been previously convicted of "oporating policy" in the same premises. A witness for the defendant who sought to place defendant outside his store at the time one of the detectives entered the store on February 14th and saw him emerging from the rear room was, in our opinion, unworthy of belief.

We find and determine that the credible evidence establishes beyond a reasonable doubt that on February 14, 1967 the defendant was in possession of and had custody and control of, and threw out the window of the rear room of his store numerous "runners' day slips" recording some 4,279 policy plays; that he knowingly kept, occupied and used his record store for the purpose of receiving written records of more than one hundred plays or bets made over any period of time and used in playing "policy" or "the numbers game" from persons other than the bettor or player whose bets or plays were represented by such written records;

that defendant was operating a policy business in violation of Section 974-a of the Penal Law; and we find him to be guilty as charged in the first and second counts of the indictment.

We find and determine that the People have failed to prove beyond a reasonable doubt the charges under the third count of the indictment, and therefore find defendant not guilty under said count.

With respect to the fourth count of the indictment (possession of obscene film as a misdemeanor): As an incident to defendant's arrest on February 15th in his record shop, one of the detectives, in the defendant's presence, found four reels of film in plain view on a shelf of the front room counter, beneath the cash register. Defendant conceded that the films contained obscene matter, that is, pornographic matter. The mere possession of obscene or pornographic matter, by itself, is not a crime (*People v. Maguire*, 5 N. Y. 2d 523; *People v. Russek*, 49 Misc. 2d 484, 487). There must be possession with intent to sell, lend, distribute, give away, show or transmute, to constitute a violation of Section 1141 subd. 1. Here the requisite intent has not been established beyond a reasonable doubt. We find defendant not guilty under the fourth count.

During the trial, defendant objected to the admission of the four reels of pornographic film in evidence, because their seizure was beyond the scope of a search of the premises incident to a lawful arrest. Under the circumstances here disclosed the objection and contention in support thereof are without merit, and the objection is overruled. Defendant's motions to dismiss the indictment on the ground that each of the four counts was defective, in that each count contains merely a recital of the statutory language constituting the respective crimes charged, and that thereby defendant was deprived of a fair opportunity to properly defend the

charges therein, are denied, as being without merit on the face of each of the counts therein.

Defendant is found guilty as charged under the first and second counts, and is found not guilty under the third and fourth counts.

Dated: White Plains, New York
June 18, 1969

JOHN H. GALLOWAY, JR.
J. S. C.

Hon. Carl A. Vergari
District Attorney
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Indictment.

COUNTY COURT,

WESTCHESTER COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK,

against

JESSE PUGH,

Defendant.

The Grand Jury of the County of Westchester, by this indictment, accuse the defendant of the crime of Operating a Policy Business in Violation §974-a of the Penal Law, committed as follows:

The defendant, in the City of Yonkers, County of Westchester, State of New York, on or about February 14, 1967 did wilfully, knowingly, wrongfully and feloniously receive written records of more than one hundred plays, bets and wagers, said plays, bets and wagers being writings, papers and documents used in what is commonly called policy and the numbers game.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of Feloniously Maintaining a Place for Playing the Game of Policy, committed as follows:

The said defendant, in the City of Yonkers, County of Westchester, State of New York, on or about February 14, 1967 did knowingly keep, occupy or use certain

premises for the purpose of receiving written records of more than 100 plays used in playing what is commonly called policy and the numbers game.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of Possession of Policy Slips in Violation §975 of the Penal Law as a Misdemeanor, committed as follows:

The said defendant, on or about February 14, 1967, not being a public officer and not being a person possessing only records of not more than 10 of his own bets, wagers and plays, did unlawfully, wilfully and knowingly have in his possession, in the City of Yonkers, County of Westchester, State of New York, writings, papers and documents representing and being a record of a chance, share and interest in numbers sold, drawn and selected and to be drawn and selected in what is commonly called "policy".

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of Possession of Obscene Film as a Misdemeanor, committed as follows:

The said defendant, in the City of Yonkers, County of Westchester, State of New York, on or about February 15, 1967, did wilfully and unlawfully have in his possession with intent to sell, lend, distribute, give away or transmute, four reels of obscene, lewd, lascivious, pornographic and filthy moving picture film.

All of the above acts are connected together and constitute parts of a common scheme and plan.

All contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ LEONARD RUBENFELD
District Attorney of the
County of Westchester